

**C.R.**

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR.JUSTICE K.T.SANKARAN  
&  
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH**

**FRIDAY, THE 9TH DAY OF JANUARY 2015/19TH POUSHA, 1936**

**CRL.A.No. 519 of 2009 (D)**  
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**AGAINST THE JUDGMENT IN SC 853/2006 of THE SESSIONS  
COURT,KOLLAM DATED 28-11-2008**

**( CP 21/2006 of J.M.F.C.-III, PUNALUR)**

**APPELLANT/APPELLANT:**

**JOHNY,C.NO.3484,  
CENTRAL PRISON,TRIVANDRUM.**

**BY ADV. SRI.N.ASHOK KUMAR**

**RESPONDENT/RESPONDENT:**

**STATE OF KERALA, REP.BY PUBLIC PROSECUTOR  
PUBLIC PROSECUTOR.**

**BY PUBLIC PROSECUTOR SHRI ROY THOMAS**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON  
09-01-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**C.R.**

**K.T. SANKARAN  
&  
BABU MATHEW P. JOSEPH, JJ.**

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**Crl. A. No. 519 of 2009**

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**Dated this the 9<sup>th</sup> day of January, 2015**

**JUDGMENT**

**K.T. Sankaran, J.**

The appellant was found guilty of the offence under Section 302 of the Indian Penal Code and he was sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- and in default to undergo rigorous imprisonment for a further period of one year. In this criminal appeal, the appellant challenges the conviction and sentence.

2. The date of occurrence was on 5.5.2004 at 10 p.m. in front of the house of Thankamma (PW2), where her

daughters Bijimol and Shijimol (PW5) were also residing. The accused is the husband of Shijimol. The deceased was in love with Bijimol, the daughter of Thankamma. The love affair was known to the inmates of the house and they agreed for their marriage. The prosecution case is that the accused did not like the deceased Aneesh Mathew coming to the house of Bijimol and he even threatened to do away with Aneesh Mathew, if he were to marry Bijimol. It is alleged that on 5.5.2004 at 10 p.m. when Aneesh Mathew (deceased) came to the house of Thankamma, the accused attacked him with MO.1 chopper. Aneesh Mathew cried aloud. Thankamma and her daughters Bijimol and Shijimol came out of the house. Rabeca (PW6), the younger sister of Thankamma, who was residing nearby, and two neighbours, namely, Sundaresan and Soman came to the scene of occurrence. The house of Thankamma is situated in an interior place and it is surrounded by reserve forest. One has to walk for half an hour to reach the place where a jeep

could be hired. A jeep was hired and Aneesh Mathew was taken to the Government Hospital, Punalur, where PW10 Doctor, after giving first aid to the victim, referred him to the Medical College Hospital, Thiruvananthapuram. The injured was taken to the Medical College Hospital, Thiruvananthapuram at 12.30 p.m. on 6.5.2004. PW17 Head Constable recorded the F.I. statement of Aneesh Mathew, on the basis of which Ext.P11(a) F.I.R. was registered by PW18, the Sub Inspector of Police. Aneesh Mathew succumbed to the injuries at 3.20 p.m. on 9.5.2004. PW3 conducted the postmortem examination and issued Ext.P1 postmortem certificate. The investigation was conducted by the Circle Inspector of Police (PW20). The accused was arrested on 7.5.2004 by PW20. According to the prosecution, the accused gave a confession statement and on the basis of which MO.1 chopper was discovered from a place hidden under a jack tree, a few metres away from the place of occurrence.

3. When PW10 Doctor examined Aneesh Mathew at the Government Hospital, Punalur, he recorded that the patient was conscious. In Ext.P11 F.I. statement, it is mentioned that Aneesh Mathew could not put his signature and therefore, his thumb impression was taken. The victim stated in the F.I. statement that his body had become paralysed below the neck as a result of the injury sustained. In the F.I. statement, the victim narrated the incident and the attack made by the accused with a chopper. He stated that he cried aloud. Thankamma and her daughters came out. When neighbours also came running to the place, the accused went away from the place with the chopper. The victim also stated in the F.I. statement that the accused attempted to kill him and inflicted the injury on account of his objection against the victim marrying Bijimol.

4. Before the court below, PWs.1 to 20 were examined and Exts.P1 to P14 were marked and Mos.1 to 5 were identified on behalf of the prosecution. Ext.D1 was marked

on the side of defence. PWs.2, 5 and 6 are the eye witnesses to the incident. PW2 (Thankamma) is the mother of Bijimol and PW5 (Shijimol) is the sister of Bijimol and wife of the accused. PW6 is the younger sister of PW2. All the three eye witnesses narrated the incident in great detail. The trial court considered the evidence in detail and held that the evidence of PWs. 2 to 5 and 6 is reliable. We have gone through the oral and documentary evidence in the case and on reappraisal of the evidence, we are also of the view that the evidence of PWs. 2, 5 and 6 gives a true and correct narration of the incident. Cross examination of the witnesses have not shaken the credibility of these witnesses.

5. In Ext.P1 postmortem report, the ante mortem injuries noted are the following:

- " 1. Sutured incised wound long, 7 cm deep, with adherent edges, on the back of neck, its lower left end being 5 cm below the left mastoid and right upper end 2 cm behind and 2 cm below the right

mastoid. Underneath the second cervical vertebra was found cut up to the vertebral canal. Spinal cord correspondingly showed haemorrhage with softening, with oedema of the segment above. The plane was slightly downwards and forwards.

Brain soft and intensely oedematous. Multiple small haemorrhages with softening seen in the white matter of left frontal and occipital lobes of brain.

Glottis oedematous. Air passages contained mucoid froth. Lungs congested and oedematous. Anterior descending branch of left coronary artery showed partial occlusion by a pale thrombus 1 cm below its origin, reducing the lumen to a slit. Myocardium appeared normal. Spleen soft and congested. Stomach contained 100 ml. of brownish fluid having no unusual smell, mucosa normal. Urinary bladder empty. Other internal organs congested otherwise normal.

Blood group of the deceased was determined as 'B' Rh negative at the Blood Bank, MCH, Thiruvananthapuram. Blood preserved and sent for chemical analysis.

Clinical case record of IP No.294391 of MCH, Thiruvananthapuram perused at autopsy. Bits from coronary arteries and myocardium preserved for histopathological examination."

PW3 stated in Ext.P1 report that death of Aneesh Mathew was due to the injuries sustained on his neck. In Ext.P6 wound certificate issued by PW10 Medical Officer at the Government Hospital, Punalur, the cause of injury is noted as the blow with chopper. PW10 stated in evidence that the injury can be caused by MO1 chopper. PW3, who conducted the postmortem, stated in evidence that the injuries sustained by Aneesh Mathew were sufficient in the ordinary course of nature to cause his death.

6. The prosecution also relies on the recovery of MO.1 chopper under Section 27 of the Evidence Act. The prosecution alleged that Ext.P9(a) confession statement was made by the accused, on the basis of which the accused led PW20 to the place where the weapon of offence was concealed and it was recovered.

7. The trial court held that Ext.P11 F.I. statement made by Aneesh Mathew can be considered as his dying declaration since he succumbed to the injuries later. The

court below also relied on the recovery of MO.1 as per Ext.P9 mahazar.

8. Learned counsel for the appellant submitted that the first information statement is not a genuine one. No doctor had certified that Aneesh Mathew was capable of giving such a statement at the relevant time. In the light of the statement in Ext.P6 wound certificate that Aneesh Mathew was conscious when he was examined by PW10 Medical Officer in the Government Hospital, Punalur, we are of the view that the submission made by the learned counsel for the appellant is not sustainable.

9. Learned counsel submitted that Aneesh Mathew sustained injuries at 10 p.m., but he was examined by PW10 only at 1.30 a.m. on the next day. He pointed out that the evidence of PW5 shows that a jeep was brought to the house at 11.30 p.m. on 5.5.2004. If so, it is not believable that the Doctor examined him only at 1.30 a.m. on the next day. The counsel submitted that the prosecution

story cannot be believed at all. We are not inclined to accept these submissions in view of the absence of any cross examination on that point when the prosecution witnesses were examined. There is no evidence in the case to show the distance from the place of occurrence to the hospital and as to what transpired immediately after the victim reached at the hospital.

10. Learned counsel submitted that the treatment records from the Medical College Hospital relating to Aneesh Mathew were not produced in the case. The absence of any records in respect of what transpired at the Medical College Hospital would make the story of the prosecution suspicious. The learned counsel submitted that it is not established that the injury sustained by Aneesh Mathew was the immediate cause of his death. In this regard, the court below criticised the prosecution for not making available the treatment records relating to Aneesh Mathew at the Medical College Hospital. It was also held by the court below that the non-

production of the treatment records by itself is not a circumstance to doubt the prosecution case. The evidence of PW3 and Ext.P1 postmortem certificate were relied on by the court below to arrive at the conclusion that the very nature of the injury sustained by the deceased was sufficient to lead to the conclusion that death was due to the injury sustained by him. Even in the absence of records relating to the treatment of Aneesh Mathew, it was held that a conclusion can be arrived at that the case comes under Section 300 of the Indian Penal Code. We are also of the view that the genuineness of the prosecution case cannot be doubted only on the ground that the treatment records of Aneesh Mathew at the Medical College Hospital were not made available by the prosecution. Even assuming that if proper treatment was given life of Aneesh Mathew could be saved, that is not a ground to take the case out of Section 300 of the Indian Penal Code. The medical evidence would unerringly indicate that the injury sustained by the deceased

was sufficient in the ordinary course of nature to cause death. If so, clause "thirdly" to Section 300 of the Indian Penal Code would be attracted.

11. Lastly, the learned counsel appearing for the appellant submitted that the court below was not justified in relying on Ext.P11 F.I. statement as a dying declaration. It is submitted that a statement can be termed as a dying declaration only if the statement is given by one anticipating the death within a reasonably proximate time. The principle that no man would meet his maker with a lie in his mouth would apply only if it can be reasonably believed that the statement giver anticipated his death immediately or in the near future.

12. The Learned Public prosecutor submitted that the law relating to dying declaration is not the same in England and in India. He relied on the decision of the Supreme Court in **Sharad v. State of Maharashtra [ A.I.R. 1984 SC 1622]**. Section 32 of the Indian Evidence Act is an

exception to the rule of hearsay and makes admissible the statement of a person who dies, provided the statement relates to cause of death or the circumstance leading to the death. In **State v. Kanchan Singh [AIR 1954 All 153]**, it was held that the Law in India does not make the admissibility of a dying declaration dependent upon the person's having a consciousness of the approach of death. Even if the person did not apprehend that he would die, a statement made by him about the circumstances of his death would be admissible under S.32 of the Evidence Act.

In **Rajindra Kumar v. State [AIR 1960 Punjab 310]**, it was held that :

"Clause (1) of Sec. 32 of the Indian Evidence Act provides that statements, written or verbal, of relevant facts made by a person who is dead, ..... are themselves relevant facts when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in case, in which the cause of that person's death comes into question. .... It is well settled by now that there is difference between

the Indian Rule and the English Rule with regard to the necessity of the declaration having been made under expectation of death.

In the English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death."

The decision of the Allahabad High Court in **State v. Kanchan Singh** [AIR 1954 All 153] and that of the Punjab High Court in **Rajindra Kumar v. State** [AIR 1960 Punjab 310] were quoted with approval by the Supreme Court in **Sharad v. State of Maharashtra** [A.I.R. 1984 SC 1622]. The Supreme Court held thus:

"(2)The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the

statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place, within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under S. 32.

(3)The second part of Cl. (1) of S. 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.”

13. In view of the decision in **Sharad v. State of**

**Maharashtra [A.I.R. 1984 SC 1622]**, the submission made by the learned counsel for the appellant that Ext.P11 F.I. statement cannot be taken as dying declaration, deserves to be rejected.

14. Minor discrepancies and some improvements also, would not justify rejection of the testimonies of the eye-witnesses, if they are otherwise reliable. Some discrepancies are bound to occur because of the sociological background of the witnesses as also the time gap between the date of occurrence and the date on which they give their depositions in court. [See **Shivappa v. State of Karnataka** (AIR 2008 SC 1860)].

15. On a careful consideration of the oral and documentary evidence in the case, we are of the view that the prosecution has established the guilt of the accused and the circumstances pointed out by the learned counsel for the accused would not make the case of prosecution unreliable. The court below rightly held that accused is guilty of the

offence under Section 302 of the Indian Penal Code. The sentence imposed by the court below is also just and proper.

The criminal appeal lacks merit and it is accordingly dismissed.

**Sd/-**

**K.T. SANKARAN  
JUDGE**

**Sd/-**

**BABU MATHEW P. JOSEPH  
JUDGE**

**ks.**

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P.S. To Judge

